March 8, 1999

In the Matter of:	*	
	*	
Ronaldo Arriaga,	*	Case No.: 1998-LHC-705
Claimant	*	
	*	OWCP No.: 18-063555
.	*	
	*	
Stevedoring Services of America,	*	
Employer	*	
	*	
and	*	
	*	
Homeport Insurance Company,	*	
Carrier	*	

Appearances:

David Utley, Esquire
For the Claimant

James P. Aleccia, Esquire
For the Employer and Carrier

Before: **DAVID W. DINARDI**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. § 901, **et. seq.**), herein referred to as the "Act." The hearing was held on February 11, 1999, in Long Beach, California, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, RX for an Employer's exhibit, and JX for a Joint exhibit. ALJ EX 1-36, CX 1-7, RX 1-10, and JX 1 were admitted to the record at the hearing without objection. This decision is being rendered after having given full consideration to the entire record.

Factual and Procedural History

The parties, by Stipulation of Facts and Request for Stipulated Decision and Order (JX 1), have agreed that Claimant, Ronaldo Arriaga, sustained work-related neck and back injuries on August 4, 1996, while operating heavy equipment in the course and scope of his employment as a steady crane operator at the marine terminal facility of Employer, Stevedoring Services of America. Claimant brought a timely claim for compensation benefits under the appropriate jurisdiction of the Act. His average weekly wage was $2,016.52.

Claimant suffered periods of temporary total disability from August 5, 1996, through and including March 10, 1997, and from January 21, 1998, through June 2, 1998, and was paid the appropriate amount of temporary total disability benefits by Employer. Claimant suffered a period of temporary partial disability from March 11, 1997, through and including January 20, 1998, and was paid the appropriate amount of temporary partial disability benefits by Employer.

Thereafter, as a result of his back injury, and following unsuccessful conservative orthopedic medical management, Claimant underwent decompressive laminectomy at L2-3 and foraminotomy on January 27, 1998, under the care of Dr. Donald Kim, Claimant's free-choice orthopedic specialist. (RX 7). The parties stipulate that Claimant reached maximum medical improvement from the effects of the August 4, 1996 injury on June 2, 1998, consistent with the opinion of Dr. Scott Haldeman. (RX 9).

The parties stipulate that Claimant has been permanently partially disabled since June 3, 1998, and that Employer paid appropriate permanent partial disability benefits to and including June 8, 1998. Beginning June 9, 1998, the parties stipulate that Claimant continues to be permanently partially disabled due to his inability to return to his pre-injury duties as a steady crane operator, but retains a residual wage earning capacity, as adjusted for inflation and pay raises pursuant to Sections 8(c)(21) and 8(h) of the Act, of $1,229.02 per week. They agree that there has been and continues to be, suitable alternative employment available to Claimant consisting of signal man and marine clerk positions off of the ILWU Dispatch Hall "Casualty Board." In fact, Claimant is currently being dispatched to such signalman and marine clerk jobs, subject to the varying availability of such jobs and Claimant's residual symptoms and limitations.

Based on his pre-injury average weekly wage, Claimant has suffered a loss of earning capacity of $787.50 per week, entitling him to a permanent partial disability award in the amount of $525.00 per week beginning July 9, 1998. The parties agree that interest upon benefits from June 9, 1998, through the date of filing of this compensation order by the District Director shall be calculated by the District Director's office and shall be paid by employer in addition to compensation benefits. Employer indicated that it withdrew its previous request for relief under Section 8(f) of the Act.

Claimant's orthopedic medical care has been provided by Dr. Kim. (CX 3-4). The claimant was also treated by Dr. Scott Haldeman, a board-certified neurologist, and Dr. James T. London, an orthopedic surgeon. (RX 8-9). The parties agree Claimant shall continue to be entitled to reasonable and necessary future medical care with respect to his neck and back injuries and the natural

progression of such injuries, pursuant to Section 7 of the Act.

Finally, the parties have discussed, negotiated and adjusted a reasonable and necessary attorney's fee to be paid by Employer to Claimant's counsel David Utley, Esquire, in the amount of $7,875.00, for services rendered to Claimant in the prosecution of this claim.

Based on these stipulated facts and exhibits, the parties have filed a Request for a Stipulated Award of Benefits, requesting this Court issue a formal order awarding benefits consistent with the Act. The parties believe their factual stipulations and proposed award of benefits to be reasonable and consistent with the evidentiary facts and applicable law.

The Request for a Stipulated Award of Benefits is **GRANTED** based on my review of this closed record and I hereby issue the following **DECISION AND ORDER:**

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

The burden thus rests upon the Employer to demonstrate the existence of suitable alternative

employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In this case, the parties have stipulated that Claimant is unable to return to his former employment as a steady crane operator due to his August 4, 1996, injury. Furthermore, the parties have stipulated to the existence of suitable alternative employment in the nature of signalman and marine clerk positions off of the ILWU Dispatch Hall Casualty Board. Accordingly, Claimant's disability is partial in that he retains a residual wage earning capacity of $1,229.02.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985).

On the basis of the parties' stipulations, as well as a totality of the record, I find and conclude that Claimant reached maximum medical improvement on June 2, 1998, according to the well-

reasoned opinion of Dr. Scott Haldeman. (RX 9). I find and conclude that Claimant is permanently partially disabled due to his inability to return to his pre-injury job duties. The parties have stipulated that suitable alternate employment, consisting of signalman and marine clerk positions off the "ILWU Dispatch Hall Casualty Board" has been and is currently available to Claimant. In fact, Claimant is currently being dispatched to signalman and marine clerk jobs from the Casualty Board, subject to the varying availability of such jobs and his residual symptoms and limitations. I find the claimant suffers permanent partial disability, with a residual wage earning capacity of $1,229.02 per week. Given his pre-injury average weekly wage of $2,016.52, his permanent partial disability has resulted in a loss of earning capacity in the amount of $787.50 per week. Accordingly, he is entitled to a permanent partial disability award in the amount of $525.00 per week, beginning June 9, 1998.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22

BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

The parties stipulate, and the record supports, that Employer will continue to be liable under Section 7(a) for all reasonable and necessary orthopedic medical treatment from Dr. Donald Kim, Claimant's free-choice orthopedic specialist, related to the Claimant's injuries to his neck and back, and the natural progression of such injuries into the future..

Attorney's Fee

Claimant's attorney, David Utley, Esq., having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and its Carrier.

The Joint Stipulation of Facts states that the parties have agreed Employer will pay a fee of $7,875.00 to Claimant's attorney for services rendered to Claimant from August 13, 1998, to and including February 11, 1999. The parties agree that the fee is reasonable and necessary for professional services rendered Claimant in this matter.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant, and Employer's agreement with the reasonableness of the fee, I find a legal fee of $7,875.00 is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. § 702.132, and is hereby approved.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I issue the following compensation order.

IT IS ORDERED THAT:

1. Claimant suffered periods of temporary total disability from August 5, 1996, to and including March 10, 1997, and from January 21, 1998, through June 2, 1998; Employer has paid the appropriate amount of temporary total disability benefits to which Claimant was entitled;

2. Claimant suffered periods of temporary partial disability from March 11, 1997, to and including January 20, 1998; Employer has paid the appropriate amount of temporary partial disability benefits to which Claimant was entitled;

3. Claimant became permanently partially disabled beginning June 3, 1998. Employer has paid permanent partial disability payments to and including June 8, 1998;

4. Claimant's pre-injury average weekly wage was $2,016.52. As a result of his permanent partial disability, Claimant's residual wage earning capacity is $1,229.02 per week;

5. Claimant is awarded, and Employer shall pay, a permanent partial disability award in the amount of $525.00 per week, beginning June 9, 1998, and such benefits shall continue until further ORDER of this Court;

6. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director;

7. Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's neck and back injury of August 4, 1996 and the natural progression of such injury into the future may require, subject to the provisions of Section 7 of the Act;

8. A reasonable attorney's fee of $7,875.00, to be paid by Employer, is approved and the same is awarded to Claimant's attorney, David Utley, Esquire, for representing Claimant during the period of August 13, 1998, to and including February 11, 1999.

DAVID W. DINARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:km